"ENTRAPMENT - A WORD OF LEGAL ART REPRESENTING A SPECIAL DEFENSE WITHIN THE PENUMBRAE OF THE CONSTITUTIONALLY PROTECTED UMBRELLA"

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"ENTRAPMENT - A WORD OF LEGAL ART
REPRESENTING A SPECIAL DEFENSE
WITHIN THE PENUMBRAS OF THE
CONSTITUTIONALLY PROTECTED UMBRELLA"

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by
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SCOPE

A comprehensive study and analysis of the principles of the doctrine of entrapment in federal and military practice, including *inter alia*: the offenses to which the doctrine may relate; the procedural problems involved; the need for judicial regulation of entrapping activity in advance of its commencement; and the development of entrapment from an affirmative defense into a right protected by the ninth amendment to the United States Constitution.

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I. INTRODUCTION

A. CONCERN FOR RIGHTS

The oppressive measures of King George III, the parens patrie of Great Britain, and his government, instigated against the American colonists, unjustly deprived them of many of the rights of free men. On 4 July 1776, after a series of unsuccessful peaceful attempts to have their rights restored, the Thirteen Colonies unanimously executed the Declaration of Independence declaring themselves to be the United States of America, free and independent of the mother country.

The Declaration, which referred to many of the abuses which had been suffered by the colonists, also stated that certain truths were self evident: "[T]hat all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

But the exercise of the fundamental rights of a free people did not immediately flow from the written Declaration, it had to be won. Although some fighting

had occurred before the Fourth of July, after that date a long and bitter struggle, the War of Independence, ensued culminating in an American victory in 1781.

A major task that faced the new nation was the drafting of a permanent document which would, inter alia, establish a national or federal government and which would embody the ideals that had been denied the Americans while colonists. In September 1787 the federal constitution was completed and by May 1790 all Thirteen States had accomplished ratification. Its origin was derived from the people[1] and its preamble was in consonance with the Declaration of Independence, reflecting the sovereignty of the people.[2] The powers vested in the federal government, consisting of three branches, were powers granted by the people. However, the Constitution as written did not expressly contain many of the rights of free men which British tyranny had usurped.

In order to afford protection to individual rights from intrusion by the federal government and a possible

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[1] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 423 (1793).

[2] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819).

fate similar to that experienced by the colonists, the first Ten Amendments to the Constitution, known as The Bill of Rights, were prepared and submitted to the States; in 1791 ratification by the States was complete. However, not all of the rights of the people were deemed to have been expressed in the Constitution and the incorporated Bill of Rights.[3]

B. THE CORNERSTONE OF AMERICAN SOCIETY

Over the years the United States has grown from thirteen to fifty states. The population has increased from mere thousands to a figure approaching the two hundred million mark. Society has become increasingly complex and legislation more profuse. The number of men required to administer, execute and adjudicate the laws has risen.

However, the quest and concern for individual rights of the people, including members of the armed forces, has not subsided. It is a nonending evolution. As society progresses latent rights come into fruition

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[3] See U.S. Const. amend. IX; Silver v. Silver, 280 U.S. 117, 122 (1929).

which require the guardianship of the Government.[4] Only recently the President of the United States in addressing and reporting to Congress proposed legislation to protect the exercise of various individual rights from intrusion.[5] During the same address the President reported that crime and lawlessness were growing and called for a stepped-up program to combat those evils and protect the right of the people to feel secure in their homes and on their streets.[6]

Despite the inherent increasing difficulties that Government faces in growing America, including society's war with the criminal classes,[7] the cornerstone of American society remains unchanged. Government is a

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[4] See, *e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (and cases cited therein); Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964) (and cases cited therein); Griswold v. State of Connecticut, 381 U.S. 479 (1965).

[5] Presidential State of the Union message delivered to Congress assembled on 12 Jan. 1966, The Washington Post Times Herald, 13 Jan. 1966, p. A6, col. 1, 2. The A.B.A., American Bar News, Vol. 11, No. 1, 15 Jan. 1966, reported that a new A.B.A. section had been proposed, which if approved will work in the field of individual rights and responsibilities.

[6] The Washington Post Times Herald, *supra* note 5, at p. A6, col. 1, 2.

[7] Sorrells v. United States, 287 U.S. 435, 453 (1932) (Roberts, J., separate opinion).

derivative of the people,[8] an institution subject to the law,[9] owing full obedience to the law, and: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it."[10]

Although there is no facet of the law that authorizes government officers or their agents to instigate crime, unlawful activity of that nature has been increasing in recent decades and not without alarm. Had the American colonists experienced similar activity, the framers of the Constitution, who were predominantly lawyers,[11] and who designed the Constitution for the common and equal benefit of all the people of the United States,[12] would undoubtedly have included an express constitutional provision protecting the people

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[8] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819).

[9] Chisholm v. Georgia, supra note 8, at 422, where the Court stated: "Government itself would be useless, if a pleasure to obey or transgress with impunity should be substituted in the place of a sanction to its laws."

[10] United States v. Lee, 106 U.S. 196, 220 (1882).

[11] Romero v. International Terminal Operating Co., 358 U.S. 354, 364 (1959).

[12] Martin v. Hunter, 14 U.S. (1 Wheat.) 304, 324 (1819).

from such governmental abuse. Despite the absence of such a provision the courts have proceeded to carve out a counter-measure which has received the denomination "entrapment".

II. WHAT IS ENTRAPMENT?

A. ENTRAPMENT GENERALLY

Entrapment is a word of art[13] which represents a particular type of affirmative defense to a criminal prosecution. Although not expressly contained in the Constitution, a federal statute, including the *Uniform Code of Military Justice*,[14] nor in the *Manual for Courts-Martial, United States, 1951*,[15] it has been adopted by the courts to signify instigation of crime by officers of government.[16]

Since 1952, when the United States Court of Military Appeals first considered an entrapment issue in one of its opinions,[17] that Court has relied heavily on the doctrine as it has been developed in the federal courts although entrapment had previously been recognized as a part of military law.[18] The development of the doctrine in the federal courts can be attributed to the

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[13] Ortega v. United States, 348 F.2d 874, 875 (D.C. Cir. 1965).

[14] 10 U.S.C. §§ 801-940 (1958) [hereinafter referred to as the Code and cited as UCMJ art. ___].

[15] Presidential Executive Order 10214 (1951), as amended, [hereinafter referred to as the Manual and cited as MCM, 1951, para. ___].

[16] Sorrells v. United States, 287 U.S. 435, 453 (1932).

[17] United States v. [illegible], 1 U.S.C.M.A. [illegible], 3 C.M.R. 80 (1952).

[18] See CM [illegible], [illegible], 2 C.M.R. [illegible] (1951) (and

growing pains of society which have necessitated an increasing number of criminal statutes and the correlative establishment of special enforcement bodies.[19]

Albeit the first duties of officers of the law are to prevent, not to punish crime,[20] due to the increasing crime rate[21] and the desire for immediate detection and law enforcement, officers of government and their agents will sometimes resort to methods which will stimulate evidence of crime with a minimum of surveillance and delay.[22] That is not to say that all activity by law

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18. (Cont'd) cases cited therein]; Dig. Ops. JAG 1912-1940 § 395 (35) (citing: CM 187319 (1929) in which it was stated that the activity of government agents in inciting and luring a soldier not engaged in criminal practices into the commission of an offense is contrary to public policy; and CM 207452 (1937), which indicated that the accused, who acted pursuant to suggestions of a staff sergeant in taking some rails belonging to the United States, would not have committed the offense had they not been led to its commission by "higher authority"].

[19] Sorrells v. United States, 287 U.S. 435, 453 (1932).

[20] Butts v. United States, 273 F. 35, 38 (8th Cir. 1921). Portions of the opinion in Butts concerning the first duties of officers of the law have been cited with approval in many subsequent opinions, including: Sorrells v. United States, *supra* note 19 at 444; United States v. Hawkins, 6 U.S.C.M.A. 135, 140, 19 C.M.R. 261, 266 (1955); U.S. v. Henna, 6 U.S.C.M.A. 502, 512, 20 C.M.R. 218, 228 (1955) (Quinn, C.J., separate concurring opinion).

[21] The Washington Post Times Herald, *supra* note 1.

[22] See Rotenberg, The Police Detection Practice of Encouragement, 49 Va. L. Rev. 871 (1963).

enforcement officers in fulfilling the duty of Government to protect the people from crime except surveillance is forbidden. Criminal activity is frequently conducted clandestinely, and much of it includes adroit manipulations using techniques that defy normal detection methods. Therefore, in preventing and waging war against crime, law enforcement officers and their agents in the front lines of the affray must use stealth and strategy[23] and must frequently contact the "criminal enemy" in order to obtain evidence of crime,[24] bring the culprits before the bar of justice, and thereby obtain a cessation of the enemy's lawlessness. These contacts require some form of communication and may even require law enforcing agents to meet the "criminal enemy" face to face and on

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[23] The Court stated: "Criminal activity is such that <u>stealth and strategy</u> are necessary weapons in the arsenal of the police officer." (Emphasis added.) Sherman v. United States, 356 U.S. 369, 372 (1958).

[24] Casey v. United States, 276 U.S. 413 (1928). In <u>Casey</u>, jailers noticed that confined drug addicts were under the influence of narcotics subsequent to the accused, an attorney, visiting the jail. A confined "stool pigeon", employed by the jailers as a decoy, requested Casey to obtain some morphine for him. Without hesitation Casey complied. At the trial evidence reflected that opiates had been introduced into the jail saturated in towels. In upholding the conviction for a narcotics offense the Court found nothing improper in the use of the decoy to obtain evidence of the accused's criminal activity.

his own ground using tactics that euphemistically speaking are immoral.

It is what sometimes transpires during these contacts with the "criminal enemy" that has caused concern in both the federal and military judicial systems, especially where an _unwary innocent_[25] person is erroneously misidentified as a "criminal enemy," becomes the object of contact, and is incited and beguiled into committing a crime manufactured by law enforcers.

At what point law enforcement activity exits from the hallowed halls of judicially accepted conduct and steps into the judicially forbidden areas giving rise to entrapment is not always easy to decipher.[26] Attempts have been made by the courts to delineate what contact activity is permissible and lawful on the one hand and what is considered overreaching and unlawful on the other. The former is sometimes referred to as

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[25] Sherman v. United States, 356 U.S. 369, 372 (1958), where the Court indicated that in order to determine whether entrapment had been established: "[A] line must be drawn between a trap for the _unwary innocent_ and the trap for the unwary criminal." (Emphasis added.) _Ibid._

[26] See United States v. Chiarella, 184 F.2d 903, 906 (2d Cir. 1950): "It is true that the law is not as definite as one might wish as to what provocation constitutes an 'entrapment'..."

lawful or legal entrapment while the latter is sometimes termed unlawful or illegal entrapment.[27] However, such expressions only tend to confuse because the word entrapment, which represents a defensive countermeasure against the heavy hand of government prosecution, includes the connotation of illegality or unlawfulness of government activity.

B. ENTRAPMENT DEFINED

As the doctrine has developed and taken on embryonic shape on a case by case basis in both the federal and military judicial systems various expressions have been

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[27] See United States v. Laverick, 348 F.2d 708 (3rd Cir. 1965); Lunsford v. United States, 200 F.2d 237, 239 (10th Cir. 1952); C.M. Spring Drug Co. v. United States, 12 F.2d 852, 856 (8th Cir. 1926). In Laverick, supra at 713, the court, in commenting upon a contention that the trial judge had erred in informing the jury that the law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment, stated that: "[W]hile the adjectives 'unlawful' and 'lawful' entrapment might have been somewhat of an overportrayal in describing the conditions requisite for entrapment, nevertheless, the thought clearly and carefully embodies that which is necessary and proper under the law....the phrases 'lawful entrapment' and 'unlawful entrapment' comport with the language used by many appellate courts in describing entrapment and the trial court's charge with respect thereto was clear and sufficient." That issue, among others, was raised by one of the accused in Laverick in a petition for writ of certiorari filed in the United States Supreme Court on 13 September 1965. The petition was denied, Schaeffer v. United States, 86 Sup. Ct. 392 (1965).

For a discussion of lawful and unlawful entrapment see Cross v. United States, 347 F.2d 327 (8th Cir. 1965).

advanced in an attempt to give entrapment a concrete meaning.

In the leading case of Sorrells v. United States[28] the United States Supreme Court for the first time in its history reversed guilty findings because of entrapment. The accused, Sorrells, contrary to his plea of not guilty, had been convicted of the statutory offenses of unlawfully possessing and selling whiskey. The evidence of record revealed that a prohibition agent together with three of the accused's acquaintances had visited the accused at his home. The agent was introduced to the accused as a furniture dealer. After ascertaining that the accused had been in the 30th Division A.E.F. during World War I, the agent factually reported that he had been a member of the same Division. He asked the accused if he could get some liquor and the accused stated that he had none. A second request was similarily fruitless. The conversation then turned to war experiences which was joined in by one of the accused's three acquaintenances who had also belonged to the 30th Division. Thereafter the agent again asked the

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[28] 287 U.S. 435 (1932).

accused to get him some liquor. This time the accused left his home and returned in a few minutes with a half gallon of liquor for which the government agent paid six five dollars. Some testimony indicating that the accused was an industrious and law abiding citizen was rebutted by other testimony to the effect that the accused had the general reputation of a rum-runner. However, there was an absence of any evidence indicating that the accused had ever possessed or sold any intoxicating liquor prior to satisfying the agent's third request.

Two opinions were written in Sorrells. Both concurred with the applicability of the entrapment doctrine to the facts of the case and each has been frequently referred to in subsequent federal and military opinions. But in establishing judicial foundations for entrapment the two views differed in many particulars, including a definition of the term. The majority stated:

> [The] defense of entrapment is not simply that the act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises.... The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for

> an alleged offense which is the product of the *creative activity of its own* officials.[29] [Emphasis added.]

The emphasis by the majority in *Sorrells* on the "predisposition" of the accused resulted in a sharp disagreement by the minority who concluded that the design and nature of the contact activity of a government officer and not the accused's subjective state of mind should be the true test for entrapment by stating: "Entrapment is the *conception and planning of an offense by an* officer [of government], and the *procurement of its commission by* one who would not have perpetrated it except for the *trickery, persuasion or fraud of the officer*."[30] (Emphasis added.) The minority definition did not, however, obviate entirely a consideration of the accused's "predisposition" since it includes the qualification "by one who would not have perpetrated [the acts], except for [improper activity of an officer of government]."

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[29] *Id.* at 451.

[30] *Id.* at 454 and cited in United States v. Hawkins, 6 U.S.C.M.A. 135, 140, 19 C.M.R. 261, 266 (1955).

Some twenty-six years later in _Sherman v. United States_[31] two opinions of the Supreme Court again emerged. Both opinions concurred that the accused had been entrapped. In determining that the facts unequivocally indicated that the accused lacked a criminal predisposition to commit the crimes alleged which had been induced by a government agent, the majority adhered to the majority definition of entrapment contained in _Sorrells_. However, the minority in _Sherman_ would look only to the nature of governmental activity: "The crucial question, not easy of answer, to which the court must direct itself is _whether the police conduct in the particular case falls below standards,_

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[31] 356 U.S. 369 (1958). In _Sherman_ a government informer met the accused in a doctor's officer where both were undergoing treatment to be cured of narcotics addiction. Several accidental meetings followed. After the two men had become fairly well acquainted the informer asked the accused if he could supply him with a source of narcotics, indicating that he was not responding to treatment and was suffering. The accused attempted to avoid the issue, but finally, after repeated requests he obtained narcotics on a number of occasions which he and the informer shared, the informer paying, inter alia, the cost of his portion of the drugs. After several such transactions the informer informed agents of the Bureau of Narcotics who observed three such sales by the accused to the informer for which the accused was convicted. The Court concluded that had it not been for the nature and repetition of the informer's requests, which overcame the accused's will to resist, that the accused would not have committed the offenses.

[illegible] in Sherman v. United States.[13] The majority of the Supreme Court again [illegible]

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[13] [illegible] (1958). In Sherman a government [illegible]

to which common feelings respond, for the proper use of governmental power."[32] (Emphasis added.)

A year prior to Sherman the United States Court of Military Appeals rendered its opinion in the leading military case of United States v. McLean.[33] In reversing a guilty finding because the accused had been entrapped that Court defined entrapment by stating: "The gist of the defense of...entrapment is that an agent [of government] conceives an offense against the law and then incites a person to commit that offense for the purpose of prosecution."[34] (Emphasis added.) This definition not only does not emphasize the accused's

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[32] Id. at 382.
[33] 8 U.S.C.M.A. 286, 24 C.M.R. 96 (1957). In McLean a government informant requested and implored the accused to obtain marihuana cigarettes for him. After a number of refusals the accused finally consented, accepted money from the informant and procured the cigarettes. The contraband was exchanged with the informant, but pursuant to the informant's request the accused retained some of the cigarettes for safekeeping. A Criminal Investigation Division Agent was advised of the transaction by the informant and apprehended the accused in possession of the cigarettes. He also discovered a marihuana cigarette stub in the accused's car. The accused was convicted of both wrongful possession and using marihuana. The Court reversed the possession offense because the government had no reasonable grounds to suspect the accused prior to the informant's entrapping activity. The use offense was sustained, based in part on independent evidence.
[34] Id. at 291, 24 C.M.R. at 101.

by which [illegible] [illegible] [illegible], the two [illegible] [illegible] of governmental power."[32] (Emphasis added.)

A year prior to Dickson the United States Court of Military Appeals rendered its opinion in the leading military case of United States v. Whitaker.[33] In reversing [illegible] [illegible] [illegible] because the accused had been induced, that Court defined entrapment by stating: "The gist of the defense of...entrapment is that an agent [of government] suggests or offers against his will and [illegible] [illegible] to commit that offense for the purpose of prosecution."[34] (Emphasis added.) This definition not only does not emphasize the accused's

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32. Id. at 312.

33. 5 U.S.C.M.A. 772, 24 C.M.R. 90 (1957). In Whitaker a government informant requested and insisted the accused [illegible] obtain marijuana cigarettes for him. After a [illegible] [illegible] the accused finally consented, [illegible] [illegible] from the informant and procured the cigarettes. [illegible] [illegible] [illegible] with the informant, [illegible] [illegible] the informant's request [illegible] [illegible] [illegible] [illegible] of the [illegible]. A Criminal Investigation Division agent was advised of the transaction by the informant and [illegible] [illegible] in connection with the cigarettes. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the informant's [illegible] [illegible]. [illegible] [illegible] [illegible], based in part on [illegible] [illegible].

34. Id. at 97, 24 C.M.R. at 101.

"predisposition" which was stressed in the definition of the majority opinion in *Sorrells* but it appears to go one step further than the minority *Sorrells* definition by failing to qualify the word "person". Therefore, as long as a government agent "conceives an offense" and thereafter "incites a person" to its commission, entrapment would be applicable; but by implication and unlike the minority in *Sherman*, the activity of the government agent would not be the only conduct requiring examination. Were the accused to have conceived the offense or if the government agent employed some degree of persuasion less than that required to "incite", entrapment would apparently not be available, at least as a matter of law.[35]

Despite differences, the definitions in *Sorrells*, *Sherman*, and *Kellens* contain a number of consistent

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[35] *But see* United States v. Watkins, 11 U.S.C.M.A. 611, 615, 29 C.M.R. 427, 431 (1960) (Latimer, J., principal opinion): "As we understand the law of entrapment there must be some evidence to show some *unwillingness* on the part of the accused to commit the crime, which is broken down by the activities of government agents." (Emphasis added.) *Ibid.* *See also* United States v. Hook, 9 U.S.C.M.A. 503, 507, 26 C.M.R. 243, 247 (1958): "/The/ record is either silent or shows unequivocally that the accused *did not resist* the overtures and that he was not a man, otherwise innocent and lawabiding....he exhibited at all times a *willingness* to violate the law...." (Emphasis added.) *Ibid.*

"predisposition" which was stressed in the definition of the majority opinion in Sorrells but it appears to go one step further than the [illegible] Sorrells definitions by failing to qualify the word "innocent". Therefore, as long as a government agent "suggested or offered" and thereafter "[illegible] a person" to its commission, entrapment would be established; but, the limitation, unlike the [illegible] in Sherman, the [illegible] of the government agent would not be met only because [illegible] predisposition. Were the accused to have committed the offense or if the government agent employed more degree of persuasion than that required to "induce", entrapment would apparently not be available, at least as a matter of law.[21]

[illegible] differently, the definitions in Sorrells, Sherman and Russell contain a number of [illegible]

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[21] [illegible] U.S.C.M.A. [illegible]

elements of entrapment. For the doctrine to exist there must have been some form of activity, chargeable to government, to which the accused was subjected, prior to his commission of a crime, that at least tended to cause him to commit the crime. In both federal and military practice nothing less than some evidence of these five elements must be shown before an issue of entrapment is raised.

But a caveat is necessary. Definitions are misleading and may represent a false bottom of reliance for the future development of the doctrine since they are subject to the general proposition that "a rule defining the course of conduct by Government officers which will constitute entrapment cannot be stated."[36] This is exemplified by two recent opinions of the Supreme Court, *Cox v. Louisiana*[37] and *Raley v. Ohio*,[38] which

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[36] United States v. Perkins, 190 F.2d 49, 51 (7th Cir. 1951). Cited with approval in United States v. Hawkins, 6 U.S.C.M.A. 135, 141, 19 C.M.R. 261, 267 (1955).

[37] 379 U.S. 559, 571 (1965). In *Cox*, city public officials authorized the accused, leader of a group, to conduct a demonstration some 101 feet from the courthouse. He complied but was later convicted of picketing near the courthouse with intent to obstruct justice. The Court, in reversing the conviction, indicated that to uphold the conviction would be to sanction entrapment by the State.

[38] 360 U.S. 423, 426 (1959). In *Raley*, the accused appeared before the "Un-American Activities" Commission

reflect that mere advise, apparently given innocently and without any purpose to punish an accused, gain evidence of crime, or to cause the commission of a crime, relied upon by an accused to his criminal detriment, can constitute an indefensible sort of entrapment. The absence of such a purpose is not reflected in entrapment definitions of current court opinions and leading authorities which purport to cover the entrapment spectrum.[39]

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38. (Cont'd) of the State of Ohio and pursuant to advice of the commission that they had a right to rely on a privilege against self-incrimination afforded by the Ohio Constitution they remained silent. They were later convicted in Ohio for having refused to answer the Commission's questions since an Ohio immunity statute denied them the Ohio constitutional privilege which they were presumed to have known. The Court concluded that the commission acted for the State in giving the advice and that to sustain convictions of most of the accused under such circumstances would be to sanction an indefensible sort of entrapment by the State, convicting citizens for exercising a privilege which the State had clearly told them was available.

39. See, e.g., Ortega v. United States, 348 F.2d 874, (D.C. Cir. 1965). In Ortega, at 876, the court defined entrapment as: "[T]he act of a government officer or agent inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him. But the mere act of an officer in furnishing the accused an opportunity to commit the crime when the criminal intent was already present in the accused's mind is not ordinarily entrapment." (Italics in original.) (The court credited Black, Law Dictionary (4th ed. 1951)); (There is an absence of a definition of entrapment in Bouvier's Law Dictionary (Baldwin's Century

refusals that were advice, apparently given innocently and without any purpose to punish an accused, gain evidence of crime, or to cause the commission of a crime, relied upon by an accused to his criminal detriment, can constitute an indefensible type of entrapment. The absence of such a purpose is not reflected in subsequent definitions in entrapment court opinions and leading authorities which purport to survey the entrapment spectrum.[37]

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36. Officials of the State of Ohio had purported to advise the witnesses that they had a right to rely on a privilege against self-incrimination afforded by the Ohio Constitution they remained silent. They were later convicted in Ohio for having refused to answer the Commission's questions since an Ohio immunity statute denied them the Ohio constitutional privilege which they were presumed to have known. The Court concluded that the [illegible] the state in giving the advice and then to sanction convictions of each of the accused under such circumstances would be to sanction an indefensible sort of entrapment by the State, convicting citizens for exercising a privilege which the state had clearly told them was available.

37. See, e.g., Sherman v. United States, 356 U.S. 369, 372 (1958). In Sherman, at 372, the court defined entrapment as: "[T]he essence of a government official or agent inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him. The mere fact of an officer in furnishing an opportunity to commit the crime when the criminal intent was already present in the accused's mind is not ordinarily entrapment." (Emphasis in original.) (The court omitted cites.) See Black's Law Dictionary (4th ed. 1951); (there is no absence of a definition of entrapment in Merriam's [illegible] Dictionary (Unabridged) [illegible]

C. THE BASES OF ENTRAPMENT

As the defense of entrapment has gained recognition the courts have sought a base upon which to rest the theory of its application. In the early opinions when it was determined that the accused had been entrapped it was frequently stated that the Government was estopped to prosecute[40] or that entrapment was contrary to public policy[41] and on occasion the theory of estoppel was commingled with that of public policy.[42]

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39. (Cont'd) ed. 1940)); Model Penal Code (Proposed Official Draft, 1962); "Section 2.13. Entrapment. (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment <u>if for the purpose of obtaining evidence of the commission of an offense</u>, he induces or encourages another person to engage in conduct constituting such offense either by:

  (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
  (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." (Emphasis added.)

The comments with the draft fail to reflect any reference or consideration given to the Supreme Court opinion in Raley v. Ohio, *supra* note 31.

[40] See, *e.g.*, O'Brien v. United States, 51 F.2d 674 (7th Cir. 1931); United States v. Lynch, 256 F. 983 (S.D.N.Y. 1918).

[41] See, *e.g.*, Ritter v. United States, 293 F. 187 (9th Cir. 1923); Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

[42] See, *e.g.*, Voves v. United States, 249 F. 191 (7th Cir. 1918). In *Voves*, government agents without

In Sorrells, the Supreme Court in first establishing guidelines for the future development of the doctrine recognized the inconsistent roles played by the Government in a case where an accused had been entrapped. The Government, acting through its agents, had been responsible for causing its entrapped victim to commit a crime. Thereafter the Government shifted its position to that of the prosecution with its erstwhile victim now the accused which the Government sought to convict for the criminal result the Government had successfully brought about. At first blush it would appear that the Government did come into court with unclean hands and that the theory of estoppel, an equitable doctrine, would be applicable to shield the accused from an unfair prosecution. However, the Court rejected the employment of an equitable doctrine in a criminal prosecution and concluded that an entirely different base was the appropriate foundation for the entrapment doctrine.

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42. (Cont'd) any reason to suspect that the accused would sell liquor to Indians dressed as Indian with a black suit, white soft shirt and black slouch hat so that he appeared to be a Mexican. The accused sold liquor to the decoy-Indian and was prosecuted. In reversing the guilty finding the court, at 192, stated: "Is our government of the superman type that relieves the ruler from the obligations of honesty and fairness that are imposed upon the citizens? Is one's liberty or reputation as a law-abider to have less protection than his property? We are strongly of the view that sound public policy estops the government from asserting that an act which involves no criminal intent was voluntarily one when it originated in and was caused by the government agents deception." (Emphasis added.)

Without any express analysis or reference to the legislative history of the criminal statute of which Sorrells had been convicted, the Court, after discussing principles of statutory construction, stated that:

> We are unable to conclude that it was *the intention of Congress* in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter [of the statute] to do violence to the spirit and purpose of the statute.[41] [Emphasis added.]

In the *Sherman* opinion the Court reiterated that it was not the intention of Congress that an entrapped accused be prosecuted.[42] The minority in *Sherman* disagreed with the theory of Congressional intent,[43] indicating that the doctrine should be upheld by the exercise of the inherent judicial power vested in the courts.[44] The minority in *Sorrells* had similarly disagreed with the *Sorrells* majority theory of Congressional

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[41] Sorrells v. United States, 287 U.S. 435, 448 (1932).

[42] In Sherman v. United States, 356 U.S. 369, 372 (1958), the Court stated: "Congress could not have *intended* that its statutes were to be enforced by tempting innocent persons into violations." (Emphasis added.)

[43] Id. at 379, where the minority referred to the Congressional intent theory as "sheer fiction."

[44] Id. at 385.

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> [illegible]

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intent[47] and had also concluded that the courts themselves possessed the authority to properly deal with entrapment.[48]

Despite the reliance on Congressional intent by the majority in both Sorrells and Sherman the federal courts have infrequently discussed or expressed that base in their opinions. The United States Court of Military Appeals has indicated reliance on [illegible] other than Congressional statutory intent and has never expressly referred to such an intent in any of its opinions that have dealt with entrapment.[49] However, the base of

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[47] In Sorrells v. United States, 287 U.S. 435, 456 (1932), the minority stated: "This seems a strained and unwarranted construction of the statute; and amounts, in fact, to judicial amendment." And at 458 indicated that it had the operative effect of "...grant[ing]... [the accused] unwarranted immunity." See also Cohen, Judicial "Legisputation" and the Dimensions of Legislative Meaning, 36 Ind. L.J. 414 (1961); [illegible], The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons, 49 J. Crim. L., C. & P.S. 447 (1959).

[48] Sorrells v. United States, supra note 47, at 457.

[49] See, e.g., United States v. [illegible], 9 U.S.C.M.A. [illegible], [illegible], 25 C.M.R. 9, 14 (1958) (estoppel, citing Sorrells); United States v. [illegible], 9 U.S.C.M.A. [illegible], [illegible], 25 C.M.R. 399, 401 (1958) (public policy); United States v. [illegible], 3 U.S.C.M.A. [illegible], [illegible], 12 C.M.R. 97, 100 (1953) (estoppel).

Congressional intent used by the Supreme Court in <u>Sorrells</u> and <u>Sherman</u> has its roots in the Constitution. Article VI states in part that: "This Constitution and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land..." No federal criminal statute expressly indicates that an entrapped accused shall not be prosecuted. However, the Court's determination of an implied Congressional negative intendment of the application of the statute constitutes no less an integral part of the statute than any of its express provisions, and not unlike the express words of the statute constitutes part of the laws of the United States and the supreme law of the land.

It would not be illogical to conclude that in both <u>Sorrells</u> and <u>Sherman</u> the Court desired to give the defense of entrapment a status that would have the roots of its base planted in the Constitution and yet would not deprive the doctrine of flexibility. Conceivably a particular type of crime could become so prevalent and pernicious that Congressional intent, whether express or implied, would permit entrapping activity by government agents as the only means available to control

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such crime.[50] On the other hand, the Court may have recognized that in the future the right of an accused not to be entrapped would gain recognition as an individual right.

Since *Sherman* the Court has considered four cases involving an issue of entrapment. Two concerned federal prosecutions[51] and two involved state prosecutions.[52] In the former two cases entrapment was not found to exist as a matter of law and no mention of Congressional intent was made by the Court in either opinion. In the latter two cases the Court found that each of the states was responsible for an entrapment as a matter of law and reversed the convictions. In view of the fact that the convictions were of state crimes in state courts there was an absence of Congressional intent upon which the

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[50] In Sorrells v. United States, 287 U.S. 435, 450 (1932) the Court stated: "The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes." And at 451 the Court indicated that: "The question /of the availability of the defense of entrapment/ in each case must be determined by the scope of the /criminal statutory/ law considered in the light of what may fairly be deemed to be its *object*." (Emphasis added.)

[51] *Lopez* v. United States, 373 U.S. 427 (1963); Masciale v. United States, 356 U.S. 386 (1958).

[52] Cox v. *Louisiana*, 379 U.S. 559 (1965); Raley v. Ohio, 360 U.S. 423 (1959).

Court could rely as the basis of its decisions. After exposing the litmus to the atmosphere of reasonable necessity the Court turned to the foremost piece of legislation, the Constitution, for a solution and concluded that the entrapped accused in both cases had been denied the process they were due under the fourteenth amendment.[53]

These decisions represent landmarks in the development of the entrapment doctrine. Presumably the Court could have relied on a base other than the Constitution to achieve the desired results without being inconsistent with its earlier determinations in *Sorrells* and *Sherman*. The important result of these two recent decisions is the fact that an accused, entrapped by state officials, has the vested constitutional right not to be prosecuted; and if an accused in a state prosecution has such a right then an accused in a federal trial should be vested with no less of a right operable through the unexpressed equal protection of the laws provision of the due process clause

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[53] *But see* Raley v. Ohio, *supra* note 52, at 445, wherein Mr. Justice Clark stated that the majority of the Court was applying the due process clause of the fifth and not the fourteenth amendment.

of the fifth amendment. Similarly, a military accused should be accorded such a constitutional protection as a matter of military due process. The Judges of the Court of Military Appeals are consistently in the van in expressing a desire for the advance of the protections to be accorded servicemen[54] and that Court, in *United States v. Jones*,[55] concluded that an accused had been denied due process because of a failure of defense counsel to raise an issue of entrapment in the trial court. In its opinion that Court cited the only other lower federal court opinion that has specifically recognized entrapment as a violation of fifth amendment due process.[56]

Despite the apparent movement of the defense of entrapment under the cloak of due process there is some

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[54] See, e.g., Navy Times, 23 Mar. 1966, p. 7, col. 1, wherein it was reported that the eighteen Ervin bills to protect the Constitutional rights of servicemen now before Congress received the support of the Court of Military Appeals and that Chief Judge Quinn had recently testified that the bills were "a step in the right direction".

[55] 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958).

[56] Id. at 603, 26 C.M.R. at 383, citing Banks v. United States, 249 F.2d 672 (9th Cir. 1957). *Compare* United States ex rel. Hall v. Illinois, 329 F.2d 354 (7th Cir. 1964), with Banks, *supra*. *See also* *Comment*, 1964 U. Ill. L.F. 821 (1964).

of the Fifth Amendment. Similarly, a military accused should be afforded such a constitutional protection as a matter of military due process. The Judges of the Court of Military Appeals are apparently in [illegible] [illegible] [illegible] of the [illegible] [50] [illegible]. The same Court, in United States v. Jacoby,[51] [illegible] that an accused had been denied due process because of a failure of defense counsel to raise an issue of entrapment in the trial court. In its opinion that Court cited the only other lower federal court opinion that has specifically recognized entrapment as a violation of Fifth Amendment due process.[52]

Whether the essential element of the defense of entrapment under the cloak of due process theory is more

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[50] [illegible]

[51] 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[52] Id. at [illegible], 29 C.M.R. at [illegible] [illegible]

anomaly in considering the right not to be entrapped as included in either substantive or procedural due process. Undoubtedly a citizen has a right not to be entrapped into committing a criminal act and it would seem that the right is far superior to any ex post facto right that an accused has subsequent to the commission of a crime. Accordingly, the constitutional right not to be entrapped should be considered more basic than due process and more akin to a natural right inherently possessed by every citizen.

D. THE OFFENSES TO WHICH ENTRAPMENT MAY RELATE

The nature of the crime charged has not been a determinative factor in the degree of success that an accused who defends on the ground of entrapment will enjoy albeit the Supreme Court in *Sorrells* indicated that there would be crimes so heinous or revolting that entrapment would be unavailable as a defense.[57] In federal proceedings an entrapment issue or its prerequisite has been

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[57] Sorrells v. United States, 287 U.S. 435, 451 (1932).

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raised in connection with a variety of crimes,[58] although violations of liquor[59] and narcotics[60] statutes have been dominant. In military practice an issue of entrapment has been raised with respect to many kinds of offenses under the Code,[61] but

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[58] See, e.g., Lopez v. United States, 373 U.S. 427 (1963) (attempted bribery); Price v. United States, 165 U.S. 311 (1897) (using the mails for obscene matter); Goode v. United States, 159 U.S. 663 (1895) (larceny from the mails); United States v. Sherwin, 207 F.2d 367 (2d Cir. 1953) (unlawfully refusing to testify); Demo v. United States, 193 F.2d 573 (D.C. Cir. 1951) (gambling); United States v. Colombia, 104 F.2d 907 (2nd Cir. 1939) (counterfeiting); Peters v. United States, 255 F. 313 (9th Cir. 1919) (espionage); United States v. Stephan, 50 F. Supp. 445 (E.D. Mich. 1943) (contention of "permissive entrapment" raised in a motion for a new trial arising from a proceeding in which the death penalty had been adjudged for treason).

[59] See, e.g., Sorrells v. United States, 287 U.S. 435 (1932); United States v. Dailey, 155 F.2d 876 (4th Cir. 1946); Carson v. United States, 56 F.2d 130 (4th Cir. 1932).

[60] See, e.g., Masciale v. United States, 356 U.S. 386 (1958); Sherman v. United States, 356 U.S. 369 (1958); United States v. Sharpe, 347 F.2d 90 (3rd Cir. 1965).

[61] See, e.g., United States v. Hurl, 14 U.S.C.M.A. 3, 33 C.M.R. 215 (1963) (false claim); United States v. Pruitt, 14 U.S.C.M.A. 306, 34 C.M.R. 386 (1964) (false official statement); United States v. Watkins, 11 U.S.C.M.A. 611, 29 C.M.R. 427 (1960) (bribery); United States v. Wolf, 9 U.S.C.M.A. 137, 25 C.M.R. 399 (1958) (housebreaking); United States v. Ghent, 7 U.S.C.M.A. 197, 21 C.M.R. 323 (1956) (attempted unlawful entry); United States v. Deren, 6 U.S.C.M.A. 665, 20 C.M.R. 250 (1955) (wrongful sale of government property); United States v. Jenkins, 1 U.S.C.M.A. 652, 5 C.M.R. 80 (1952) (exhibiting lewd motion pictures); ACM 13995, Dean, 24 C.M.R. 798 (1957) (disrespectful behavior); ACM 9217, Cascio, 18 C.M.R. 779 (1955) (attempt to give intelligence to the enemy); ACM 8014, Durham, 15 C.M.R. 621 (1954) (wrongful disposition of government property); CM 365134, Stevens, 13 C.M.R. 320 (1953) (indecent acts with a minor).

narcotics[62] and larceny[63] violations have been the main targets of the defense.

The frequency of the claim of entrapment in both federal and military trials of narcotics offenders can be attributed to the growing number of narcotics offenses and the detection methods continually employed by government agents. Offenses such as the sale, use, and possession of narcotics are consummated in secret and marshaling evidence of such crimes will not usually be accomplished without affording a suspect an opportunity to commit an offense in which to some degree a government agent is involved. Any such involvement will give rise to a claim of entrapment when the accused is brought to trial.[64] Problems similar to those experienced in the narcotics field can be expected to be encountered with

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[62] See, e.g., United States v. Horne, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958); United States v. Hock, 9 U.S.C.M.A. 503, 26 C.M.R. 283 (1958); United States v. Boule, 9 U.S.C.M.A. 228, 26 C.M.R. 9 (1958).

[63] United States v. Labossieri, 13 U.S.C.M.A. 337, 32 C.M.R. 337 (1962); United States v. Ross, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962); United States v. Wolf, 9 U.S.C.M.A. 137, 25 C.M.R. 399 (1958).

[64] See, e.g., Masciale v. United States, 356 U.S. 386 (1958); Jordan v. United States, 348 F.2d 433 (10th Cir. 1965); Cross v. United States, 347 F.2d 327 (8th Cir. 1965).

the expanding illegal market of psychedelic drugs[65] unless government officials achieve appreciably more success in cutting off the supply of such drugs than they have with narcotic supplies.

In Sherman the Supreme Court ostensibly withdrew any limitation on the type of crimes to which entrapment could relate when it was stated that: "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."[66] (Emphasis added.) The statement can be interpreted to mean that there is no criminal statute, regardless of the nature of the crime it proscribes, to which the defense of entrapment could not relate, including the military crime of premeditated murder under the Code.[67] There has also been an indication from within the Court of Military Appeals that the doctrine could be applicable to any offense under the Code.[68]

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[65] See Life, 25 Mar. 1966, p. 28-33.

[66] Sherman v. United States, 356 U.S. 369, 372 (1958).

[67] UCMJ art. 118(1).

[68] In United States v. Watkins, 11 U.S.C.M.A. 611, 622, 29 C.M.R. 427, 438 (1960) (Ferguson, J., dissenting), Judge Ferguson indicated the Court had concluded in United States v. McGlenn, 8 U.S.C.M.A. 286, 24 C.M.R. 96 (1957), that: "[E]ntrapment was available as a defense whenever Government agents induced the commission of an offense...." (Emphasis added.)

But should all federal crimes be amenable to the entrapment doctrine? Should any crime that involves a serious injury to the person of another human being such as the Code offenses of intentionally inflicting grievous bodily harm[69] and maiming[70] be subject to the doctrine? Should entrapment be applicable to crimes under the Code resulting in loss of life such as premeditated murder and manslaughter?[71] Should the doctrine be unavailable for all crimes which include conduct that causes or threatens bodily injury to a person other than the entrapper as has been suggested?[72] Is it logical to set aside any particular class of offenses such as those causing or threatening bodily injury from other crimes, many of which carry a heavier penalty than offenses within such a class? The answer to the foregoing questions, or any similar questions that attempt to carve out the availability of the doctrine to a

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[69] UCMJ art. 128(b)(2).
[70] UCMJ art. 124.
[71] UCMJ art. 119.
[72] See Model Penal Code (Proposed Official Draft, 1962), § 2.13(3). In Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956), a government agent's entrapping activity constituted apparent consent which vitiated an assault. Contra CM 365139, Herrera, 13 C.M.R. 220 (1953).

particular crime, class of crimes, or classes of crimes, will be controlled by the basis of the doctrine. The fifth amendment provides a privilege against coerced confessions and the fourth amendment grants the right against unlawful searches. The objectionate methods used in obtaining such confessions and in conducting such searches have been equated with the conduct of government agents involved in entrapment.[73] The nature of the crime is not determinative of whether the coerced confession or the fruits of an unlawful search may be employed against an accused. When a constitutional right is involved there is no balancing of equities between unlawful governmental activity and the right of the individual. And as the basis of the entrapment doctrine becomes embodied deeper in the law as a constitutionally protected individual right not to be entrapped the weight of the nature of the crime committed will be negligible in its pan of the scales of justice. The comparative inflexibility of constitutional decision-

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[73] Sherman v. United States, 356 U.S. 369, 372 (1958).

nothing should result is no crime, regardless of its nature, being considered without the scope of the doctrine.

III. THE SEARCH FOR EVIDENCE OF CRIME

A. THE GOVERNMENT AGENCY

In many areas of the law Congress has,by statute, specifically limited the authority of government agents and "actions beyond those limitations are considered individual and not sovereign actions. The officer [or agent] is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are [therefore] _ultra vires_ his authority...."[74] Congress has enacted some statutes which limit the authority of some government agents engaged in law enforcement and crime detection[75] but has not expressly limited either the authority of government agents in the field of entrapment, or the way in which they may offer opportunities

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[74] Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 689 (1949). (Emphasis in original.)

[75] See, _e.g._, 18 U.S.C. 3052, which authorizes, inter alia, agents of the Federal Bureau of Investigation to make arrests without warrant for a felony if they have _reasonable grounds to believe_ that the person to be arrested has committed or is committing a _felony_ cognizable under the laws of the United States, but limits arrests without warrant for lesser crimes to those committed in their presence. _Compare_ MCM, 1951, para. 19, which governs arrest in the military community, termed "apprehension". Apprehension is authorized _if necessary_ upon a _reasonable belief_ that _any offense_ under the UCMJ has been committed.

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ment agents concerned in law enforcement and crime detection[75] but has not expressly limited either the authority of government agents in the field of entrapment, or the way in which they may offer opportunities

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[74] [illegible]

[75] [illegible]

for the commission of crime. Perhaps this is just as well. A failure by a government agent to adhere to statutory restrictions would result in his actions being considered "ultra vires," of an individual nature, and not chargeable to the government. The defense of entrapment would therefore be lost to an accused since the defense is only available when the government is considered responsible for the crime alleged. And no reported federal or military opinion has been found that has denied the accused the defense because the actions of the government agent in carrying out entrapping activity were deemed to be outside the scope of his employment.[76] Despite the language courts have used in expressing disdain for the [illegible] activity employed.[77]

Not only are acts of government agents imputable to the government, but the courts have treated the question of who will be considered a government agent with liberality. Officers and officials of government are

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[76] But see [illegible] v. United States, 177 F.2d 905, 910 (1st Cir. 1950).

[77] See, e.g., Sherman v. United States, 356 U.S. 369, 384 (1958) (Frankfurter, J., concurring in result) (reprehensible); Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., separate opinion) (revolting); United States v. Romano, 278 F.2d 202, 204 (2nd Cir. 1960) (unsavory); United States v. [illegible], 9 U.S.C.M.A. 284, 293, 26 C.M.R. 96, 103 (1958) (disgraceful).

necessarily agents and so are those whose services they obtain to assist in the process of law enforcement and detection of crime. Law enforcers are often unable to gain access to the inner circles of crime in their official capacity. They must therefore either conceal their true identity or engage the services of others who will be able to enter those inner circles and marshal evidence of crime which can be made available for judicial scrutiny and a successful criminal prosecution. Those so engaged are described by various expressions[75] but in rendering their services they are no less agents of government within the entrapment doctrine than are those who employed them. Frequently their activity in

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[75] See, e.g., Casey v. United States, 276 U.S. 413 (1928) (stool pigeon); United States v. Clarke, 343 F.2d 90, 92 (3rd Cir. 1965) and Lefty v. United States, 195 F.2d 760, 761 (5th Cir. 1952) (special employee); Accardi v. United States, 343 F.2d 139 (5th Cir. 1965) (hired undercover agent).

In the following cases the expression "informer" was employed: Sherman v. United States, 356 U.S. 369 (1958); Jordan v. United States, 348 F.2d 597 (10th Cir. 1965); United States v. Smith, 343 F.2d 847 (6th Cir. 1965). These cases are not untypical in the improper use of the expression "informer", since in each the "informer" was actively engaged in encouraging crime and was not merely a communicator of information. Compare Sorrentino v. United States, 163 F.2d 627, 629 (9th Cir. 1947) and United States v. Hawkins, 6 U.S.C.M.A. 135, 139, 19 C.M.R. 261, 265 (1955).

fulfilling their roles will receive a more meticulous examination than that of a government officer or official, especially where the terms of their employment call for a contingent fee arrangement to produce evidence against particular accused as to crimes not yet committed,[79] or where control over their activity is lacking.[80]

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[79] In Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), the court refused to sanction a contingent fee arrangement. Contra, Hill v. United States, 328 F.2d 988 (1964). See Notes, 16 Syracuse L.R. 143 (1964) and 49 Va. L.R. 1021 (1963).

[80] In United States v. McGlenn, 8 U.S.C.M.A. 286, 293, 24 C.M.R. 96, 103 (1957) the Court condemned the use of a government agent to indiscriminately solicit and induce fellow servicemen to commit crimes in exchange for a service separation which would not to be preceded by court-martial for his own offenses; and in Sherman v. United States, 356 U.S. 369 (1958), the Court refused to absolve the Government of responsibility because its officials had been unaware of the method used by an active government informer in entrapping the accused. Compare United States v. Klosterman, 248 F.2d 191 (3rd Cir. 1957), wherein an entrapped suspect was deemed to have become a government agent due to his entrapment. See also Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L. J. (1951).

Despite the liberal agency rule not every member of the armed forces wearing the uniform of this Country will be considered an agent of government within the entrapment doctrine, even if he holds an enlisted appointment as a noncommissioned officer, as long as his duties do not include those of law enforcement or crime detection;[81] and when military agents dispose of government property in a manner not authorized by law or regulation, such disposition will not carry with it the consent of the government.[82]

B. PROCURING CRIME

The distinction between permissive contact activity not forbidden to the government and contact activity that will be condemned as overpersuasive will usually depend not only upon a consideration of the nature of the activity, but also upon what was known by the government agents of the probable state of mind of the accused at the time he was encouraged to commit a crime.

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[81] See, e.g., United States v. Wolf, 9 U.S.C.M.A. 137, 25 C.M.R. 397 (1958).

[82] See, e.g., United States v. [illegible], [illegible] U.S.C.M.A. 557, 20 C.M.R. [illegible] (1955); United States v. Cook, 3 U.S.C.M.A. 341, 12 C.M.R. 97 (1953).

During the last decade of the Nineteenth Century a series of "decoy letter" cases was decided by the Supreme Court which underlay the *Sorrells* decision. In *Price v. United States*,[83] a government inspector had been informed that the accused was depositing obscene matter in the mails in violation of a federal statute. The inspector "for the *purpose* of *discovering whether or not*...[the accused] *was engaged in such violation*,...wrote several communications in the nature of *decoy letters*,...asking ...[the accused]...to send him through the mail certain books of the character covered by the statute, which he did..."[84] (Emphasis added.) The Court in upholding the accused's conviction for sending obscene matter to the inspector through the mails found no impropriety in the inspector's conduct that would constitute a valid ground upon which the accused could object,[85] since the information received by the inspector was sufficient to justify

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[83] 165 U.S. 311 (1897).
[84] *Id.* at 315.
[85] *See also* Rosen v. United States, 161 U.S. 29 (1896) (obscene matter placed in mails in response to a decoy letter); Goode v. United States, 159 U.S. 663 (1895), (successful use of a decoy letter containing currency and stamps to trap the accused postman who was suspected of stealing from the mails after complaints had been received). *Compare* Andrews v. United States, 162 U.S. 420 (1896), wherein the Court condoned the misrepresentation of gender, as well as the name and address of the government agent - addressor of a decoy letter in order to obtain evidence of the accused's conduct of sending obscene matter through the mails.

the "decoy letters" which actually triggered the crime for which the accused was convicted.[56] But, had it not been for those particular letters the accused would never have committed *that* crime, although in sending the books he confirmed the inspector's suspicions. The inspector's earnest activity was condoned on the theory that the accused had the intent to commit that particular type of crime in advance of receiving the "decoy letters" and that the letters did nothing but gain evidence of his criminal activity; the inspector's conduct was noncriminal in nature since he was only carrying out his duties of "discovering crime". This type of reasoning is frequently advanced in both federal and military opinions to justify

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[56] *Compare* Grimm v. United States, 156 U.S. 604, (1895), wherein the Court in upholding the accused's conviction which was based upon facts similar to those in *Sikes*, except that the evidence of record did not disclose why the postal inspector suspected the accused, stated: "It does not appear that it was the *purpose* of the...inspector to *induce* or *solicit* the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official - a detective he may be called - do not of themselves constitute a defense to the crime actually committed." (Emphasis added.) *Ibid* at 610.

the "lower faculty" which [illegible] for which the command was [illegible]

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or excuse the actions of government agents in "pro-curing" the commission of a crime where information is received indicating that a suspect is criminally engaged.[87] Such information need not come only from complaints,[88] it may be obtained from various sources; and the standard of its reliability upon which the agents may act to "procure" a crime is less than that of probable cause.[89] When the authorities are unable to determine the identity of a person engaged in committing crimes it is their duty to solve such crimes by setting a trap, if need be, to ensnare the wrongdoer.[90] However,

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[87] Shields v. United States, 26 F.2d 993 (D.C. Cir. 1928); United States v. Hebb, 9 U.S.C.M.A. 503, 26 C.M.R. 283 (1958).

[88] See, e.g., United States v. Burkhart, 347 F.2d 772 (6th Cir. 1965) (agent's chance encounter with, and inquiry of, a hitchhiker); United States v. Clarke, 343 F.2d 90 (3rd Cir. 1965) (friend of accused).

[89] See, e.g., Trice v. United States, 211 F.2d 513 (9th Cir. 1954) (reasonable cause); Childs v. United States, 267 F.2d 619 (D.C. Cir. 1958) (reasonable suspicion); United States v. [illegible], 8 U.S.C.M.A. [illegible], 24 C.M.R. 46 (1957) (reasonable belief or suspicion). Compare United States v. Hebb, 9 U.S.C.M.A. 503, 26 C.M.R. 283 (1958) (belief or suspicion).

[90] See, e.g., Hamilton v. United States, 221 F.2d 611 (5th Cir. 1955); CM 393477, Jermain 23 C.M.R. 566 (1957); ACM [illegible], [illegible], 20 C.M.R. 564 (1955).

a different situation is presented when the input of information has *focused* on a *particular person* as the culprit. "The function of law enforcement is the *prevention* of crime and the apprehension of criminals. Manifestly, this does not include the *manufacturing of* crime."[91] (Emphasis added.) To be successful law enforcement must obtain evidence of crime. Obtaining evidence of crime and "procuring" a criminal act for the purported purpose of obtaining more evidence constitutes circular reasoning. One is logically incompatible with the other. Investigation, not instigation of further criminality, should be the means used to gain evidence against the suspect. Frequently circumstances make investigation difficult and during an investigation the suspect's constitutional rights limit investigators. If the suspect is to be arrested pursuant to a warrant, the fourth amendment requires a showing of probable cause before the warrant will be issued by a magistrate. Whether the arrest is based on a warrant or not the

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91. Sherman v. U.S., 356 U.S. 369, 372 (1958).

McNabb-Mallory rule[92] requires that upon arrest the suspect be taken before a magistrate without undue delay so that he may be informed of his rights. A search not connected directly with a lawful arrest cannot be conducted of the suspects' property, such as his automobile[93] or even garbage can,[94] without a search warrant being issued by a magistrate based on probable cause required by the fourth amendment. Statements made by the suspect are violations of his fifth amendment right against self-incrimination if he has asked for and been denied the right to see his attorney without being advised of his right to remain silent;[95] and the denial of his request is violative of his sixth amendment right to counsel.[96]

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[92] The rule evolves from two decisions of the Supreme Court, Mallory v. United States, 354 U.S. 449 (1957), and McNabb v. United States, 318 U.S. 332 (1943), and precludes the admission in evidence of the confession of an accused if it was obtained during any period of unnecessary delay in taking him before a committing magistrate after arrest, even though the confession is deemed reliable and was voluntarily obtained.

[93] Fahy v. Connecticut, 375 U.S. 85 (1963).

[94] Work v. United States, 243 F.2d 660 (D.C. Cir. 1957).

[95] Escobedo v. Illinois, 378 U.S. 478 (1964).

[96] Id.

Those constitutional rights have not had any significant impact in the case of a suspect who has not been arrested and interrogated, or whose property has not been searched. Yet such a suspect may be no less of a suspect if government agents have a reasonable belief that he is criminally engaged. Yet, his position is less favorable than the arrestee. Government agents in their search for evidence of his criminality will not have to concern themselves with meeting any probable cause requirement before a magistrate in order to carry out their search. They are free to do as they please in their attempts to gain evidence of his criminality by encouraging him to commit an unlawful act since there is a total absence of any judicial regulation until well after the suspect has been successfully encouraged to commit a crime.

It may be easier for government agents to "procure" a crime and thereby indirectly avoid the immediate stumbling blocks of constitutional rights and judicial regulation. However, it is suggested that despite the ignoble role of government agents in such "procurement" activity, the right of the individual not to have his Government sponsoring his criminality is a far more superior right than that protecting against an unlawful search of a garbage can.

C. AIDING IN THE COMMISSION OF CRIME

A somewhat different situation is presented where the criminal design to commit a particular crime originates in the mind of the accused and he suggests or initiates that crime for which he later stands trial. In the leading and highly publicized case of United States v. Buck,[97] one of the most unusual criminal cases in the annals of military jurisprudence, an individual hereafter identified as "X" approached a supply sergeant and offered $50.00 for a large quantity of assorted government chevrons. The sergeant, after suggesting that "X" call him the next day, contacted his officer seniors and was directed to give "X" the chevrons. "X" called and was told that the chevrons were ready for him. When he arrived the sergeant removed the chevrons and placed them at the door of the building. "X" took them, placed them in his car, paid the sergeant the promised $50.00, and left rapidly before the assigned criminal investigator and other noncommissioned officers who had observed the transaction could effect an apprehension. Master

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[97] 3 U.S.C.M.A. 341, 12 C.M.R. 97 (1953).

Sergeant Carl Fidler Buck, U.S. Marine Corps, was identified as "X", and stood trial before a general court-martial for larceny of the chevrons from the United States. Contrary to his not guilty plea he was convicted and sentenced to, inter alia, a punitive discharge and confinement. The Board of Review reversed the conviction after determining that governmental consent and a consequent lack of trespass negated the crime of larceny. The Judge Advocate General of the Navy certified the record to the Court of Military Appeals. On 11 September 1953, the Court rendered its opinion which included a discussion of three issues of law, entrapment, governmental consent, and asportation. The court concluded that since neither the supply sergeant or his seniors had authority to so dispose of the chevrons that there had been an absence of governmental consent, and that the movement of the chattels from outside the warehouse constituted a sufficient asportation for larceny. The Court also rejected the entrapment issue since the original plan had originated with the accused ("X") and the supply sergeant had served not as a vendor, but merely as a decoy to permit his seniors to lay a trap.

During the twelve year period from 11 September 1953 until 10 September 1965, Buck continually took steps in an attempt to have his conviction overturned,[98] not on the ground that he had been entrapped, but because he had not been "X". In 1958 the Court of Military Appeals in denying a motion by Buck to reopen the proceedings, stated: "The terminal point, which all litigation must eventually have was reached and passed more than three years ago."[99] However, on 10 September 1965, the President of the United States granted Buck a full and unconditional pardon,[100]

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[98] See 111 Cong. Rec. 22699-22702 (1965) (remarks of Senator Douglas), wherein Mr. Howard Shuman of the staff of Senator Douglas, among others, is credited with nine years of effort and investigation in Buck's behalf.

[99] United States v. Buck, 9 U.S.C.M.A. 290, 297, 26 C.M.R. 70, 77 (1958).

[100] A copy of the pardon of Carl [illegible] Buck, signed by President Lyndon B. Johnson, dated 10 Sept. 1965, in the possession of the author. The pardon reflects that subsequent to Buck's bad conduct discharge on 13 Jan. 1955 the Board for the Correction of Naval Records modified the nature of the discharge to that of general [illegible] conduct.

In a personal interview between the author and Mr. Howard Shuman, administrative assistant to Senator Douglas, on 29 Dec. 1965, Mr. Shuman indicated that Buck had been released from confinement when the Board of Review set aside the guilty findings, on 23 Jan. 1953, but had been improperly reconfined when the Judge Advocate General of the Navy certified the trial record to the Court of Military Appeals. As a consequence of this reconfinement Buck later instituted suit in the Court

exercising the powers of pardon vested in the President by section 2, article III of the Constitution.[101]

The opinions have uniformly held that where the criminal scheme or plan originates in the mind of the accused to commit a particular crime, government agents may render assistance to the accused. This assistance may take various forms, such as providing the object of criminal intent,[102] as in Buck, in providing building plans for a prospective housebreaking,[103] engaging in the planning for a crime,[104] and in the final commission of a crime.[105] This is less objectionable than "procuring" a crime, since the criminal intent for the

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100. (Cont'd) of claims, but before trial the Government settled for $5,000. Mr. Shuman also reported that Buck who had desired to spend thirty years in the service was eligible for promotion to warrant officer about the time of his general court-martial when he still had less than twenty years service. He indicated that the Board for the Correction of Naval Records had the matter before it and that no determinations had been made concerning Buck's constructive grade, service time, or pecuniary compensation.

[101] See Biddle v. Perovich, 274 U.S. 480 (1927).

[102] Sittman v. United States, 3 F.2d 718 (D.C. Cir. 1925); United States v. Dames, 6 U.S.C.M.A. 302, 20 C.M.R. 218 (1955).

[103] United States v. Groat, 7 U.S.C.M.A. 187, 22 C.M.R. 313 (1956).

[104] Id.

[105] ACM 13416, Alexander, 24 C.M.R. 533 (1957).

particular crime originated with the accused. However, law enforcement officials should endeavor to prevent a lesser crime from developing into a major crime,[176] and the actions of government agents engaging in any criminal activity is a detraction from the nobility of Government. It would be far more appropriate were they to either nip the criminal scheme in the bud or to maintain investigative surveillance, rather than to become active, albeit non-official, participants. And the [illegible] claim of an accused who committed a crime which could have been stopped by government officials aware of his criminal scheme will not be excused as a "permissive entrapment" because the officials failed to act.[177]

D. CREATIVE CRIME

"The right to be let alone [by Government] - [is] the most comprehensive of rights and the most valued by

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176. See United States v. [illegible], [illegible] U.S.C.M.A. [illegible], [illegible], 20 C.M.R. [illegible], [illegible] (1955) and the concurring opinion of Chief Judge Quinn in United States v. [illegible], [illegible] U.S.C.M.A. [illegible], 20 C.M.R. 2[illegible] (1955).
177. United States v. [illegible], 1 U.S.C.M.A. [illegible], [illegible] C.M.R. [illegible] (1952).

civilized men."[148] That right is probably raised no more, on a continuing basis, than in the field of entrapment. But it is not an absolute right. There is no impropriety in requiring an individual to carry out a lawful duty, and if he chooses to fulfill this obligation in an unlawful manner he cannot later complain that he was entrapped.[149] The right to be let alone is, however, diluted when agents of government are creating crime. In essence the attempts of governmental agents at such creation have been condemned because their conduct created crime,[150] but more often,

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[148] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[149] See, e.g., Jordan v. United States, [illegible] F.2d [illegible] ([illegible] Cir. [illegible]); United States v. Ward, [illegible] U.S.C.M.A. [illegible], [illegible] C.M.R. [illegible] ([illegible]); United States v. Pruitt, 12 U.S.C.M.A. [illegible], 32 C.M.R. 322 (1961).

[150] See, e.g., Castro v. United States, 2[illegible]7 F.2d [illegible] ([illegible] Cir. [illegible]) (consent to assault); [illegible] v. United States, [illegible] F.2d 274 (7th Cir. 1924) (consent to armed assault); United States v. [illegible], [illegible] F. Supp. 23 ([illegible] 1940) ([illegible] that purchase of regular alcohol may not [illegible] for [illegible]).

If they persevere and utilize the proper inducement their efforts will be fruitful because "human nature is too frail and weak in many cases, to withstand temptations...."[111]

Although there is no all embracing rule that will define the conduct of government agents which will constitute entrapment,[112] and notwithstanding the deceptions of government agents stimulating crime that is but one in a course committed by a suspect, or in aiding the suspect who suggested or initiated a criminal plan, the most pernicious form of government activity and that which is most violative of the right to be let alone consists of inspiring persons to commit criminal acts who had possessed no previous thought of such criminality. And in inducing such persons to commit crime agents have used various tactics, including, deceitful appeals to sympathy by feigning pain and suffering,[113] lying about assistance needed by a sick

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[111] [illegible] v. United States, 32 F.2d 595, 597 (8th Cir. 1929).
[112] United States v. Perkins, 190 F.2d 49, 52 (1951).
[113] Butts v. United States, 273 F.35 (8th Cir. 1921).

relative,[114] repeatedly suggesting an unlawful transaction,[115] and spurious appeals to friendship.[116] Such tactics creating crime have not been condoned by the courts, but temptations of a less extraordinary nature have not been met with absolute judicial disapproval if the accused "readily complied" with an agent's suggestion to commit a crime,[117] although an accused who, without such persuasion, becomes a mere procuring agent of a government agent in obtaining narcotics for the latter will not be deemed a seller of the contraband.[118]

In United States v. [illegible][119] the Court of Military Appeals purported to reject the theory of "ready compliance," by stating: "[W]hen a showing of inducement

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[114] Hunter v. United States, 62 F.2d 217 (5th Cir. 1932).

[115] Sherman v. United States, 356 U.S. 369 (1958); Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

[116] Silk v. United States, 16 F.2d 568 (8th Cir. 1926).

[117] Sullivan v. United States, 219 F.2d 760 (D.C. Cir. 1955). Compare Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Weathers v. U.S., 126 F.2d 118 (5th Cir. 1942).

[118] Adams v. United States, 220 F.2d 297 (5th Cir. 1955).

[119] 7 U.S.C.M.A. 256, 26 C.M.R. 36 (1957).

by a Government agent is made, the prosecution *must prove* its agents acted under a reasonable belief [or suspicion] that the law was being violated by the accused"[120] (Emphasis added.). Some three years later in *United States v. Hawkins*,[121] the accused entered a guilty plea to two bribery offenses and one larceny offense. An out of court hearing was conducted by the law officer to determine the providence of the accused's guilty plea. During the hearing the accused reported that shortly after he had been apprehended for the larceny offense he offered to pay money to the government agents if the larceny charge were to be dropped, but he made no such offer until one of the agents who had him in custody had first asked him how much it would be worth to him to get out of the trouble he was in. This information, supplied by the accused, was unrebutted and the law officer indicated that the defense of entrapment appeared applicable and therefore did not immediately accept the guilty plea. The accused

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[120] *Id.* at 291, 29 C.M.R. at 101.
[121] 11 U.S.C.M.A. 611, 29 C.M.R. 427 (1960).

and his counsel then conferred and concluded that in view of an outstanding pre-trial agreement, and notwithstanding the possible defense of entrapment, it would be in the accused's best interest were his plea of guilty accepted; the accused also intimated that the two agents would probably report a different version of the incident than he had and that the court would undoubtedly believe them. Thereafter the law officer accepted the plea.

Three opinions were written after the Court of Military Appeals reviewed the [illegible] record. The conviction was upheld by the opinions of Chief Judge Quinn and Judge Latimer. Judge Latimer's principal opinion stated that the accused had not indicated that he did not have a consciousness of guilt nor was he an unwilling victim, and that the defense of entrapment requires some unwillingness to commit the crime. Chief Judge Quinn's opinion indicated that the accused had knowingly waived the defense of entrapment.[122] In dissenting, Judge Ferguson concluded that the accused had

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[122] [illegible] United States v. [illegible], 9 U.S.C.M.A. [illegible], [illegible] C.M.R. 361 (1958).

been entrapped since the record gave no hint that the government agents had cause to suspect that the accused, who was in a vulnerable position, would offer a bribe and that the defense of entrapment was available whenever government agents induced the commission of an offense.

From the information of record Watkins had not been engaged in earlier bribery offenses and he had not initiated or suggested either of the two bribery crimes that were charged. The idea of bribery had been planted in his mind by a government agent and ostensibly Watkins was "a person otherwise innocent [of bribery] whom the Government...[was] seeking to punish for...alleged offense[s] which...[were] the product of the creative activity of its own officials."[123] However, the trial record did reflect that the instant larceny offense was not Watkins' first, and he appeared to want to avoid a confrontation with the government

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[123] Sorrells v. United States, 287 U.S. 435, 451 (1932).

agent's whose version of the incident he felt would not only be different than his, but would be more creditable. Albeit McGuire's credibility was not unimpaired, the result of the decision is questionable. Judge Latimer's opinion would indicate that the entrapment defense is unavailable if there is a failure to resist the wrongful inducement of a government agent despite the accused's custody status and his inclination toward unlawful conduct independent of inducement, which was known by the inducing agent who was his custodian. Chief Judge Quinn did not expressly disagree with Judge Latimer but indicated that there can be an informed waiver of the defense. The two opinions equate to the conclusion that as a matter of law the unrebutted information of record indicating an inducement by a government agent was insufficient to require reversal of the [illegible] guilty findings. This conclusion is a retraction from the Court's stated position in [illegible] requiring the prosecution to prove the basis for the activity of a government agent upon the showing of inducement and an apparent acceptance of the "ready compliance" theory.

It is suggested that the use of a "ready compliance" theory will, in denying the defense of entrapment to an accused, affect those of weak moral fibre and a criminal bent. They don't need coddling, but they, no less than others, deserve to be extended the right to be let alone, and a [illegible] should not be subject to criminal temptation by government agents any more than should a law abiding citizen. "A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes anything goes."[129]

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[129] Sherman v. United States, 356 U.S. 369, 383 (1958) (Frankfurter, J., separate opinion).

IV. THE ENTRAPMENT ISSUE

A. LAW OR FACT

In *Sorrells* the majority of the Supreme Court held that the issue of entrapment was to be treated as a question of fact and submitted to the jury for determination while the minority felt it was one of law,[125] although conceding that the issue should be submitted to the jury if the trial judge were in doubt as to the facts. The foregoing differences within the Supreme Court were somewhat relaxed in *Sherman* with both the majority and minority concluding that albeit the guilty findings rested upon the verdict of a jury which had considered the issue of entrapment as a factual matter, that the accused had been entrapped as a matter of law and accordingly reversed those findings. The minority adhered to the position of the *Sorrells* minority that entrapment should be for the consideration of the trial

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[125] Sorrells v. United States, 287 U.S. 435, 457 (1932), where it was stated: "Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set---[free]." *Ibid.*

judge, while the majority reiterated the view of the majority in Sorrells that in the trial forum the issue was for the jury. However, by adoptive implication, the majority in Sherman appeared to qualify its position somewhat[126] and in Lopez v. United States[127] the Court indicated that upon a conclusive showing of entrapment the issue was for the trial judge,[128] but in the absence of such a showing entrapment remains a jury issue.[129]

In advance of Sherman the Court of Military Appeals, in United States v. McGlenn,[130] concluded that where

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[126] 356 U.S. 369, 377 (1958), stating: "[W]here the issue has been presented to them, the Courts of Appeals have since Sorrells unanimously concluded that unless it can be decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury as part of its function of determining...guilt or innocence..." Ibid. (Emphasis in original.)

[127] 373 U.S. 427 (1963).

[128] Id. at 434.

[129] Id. Compare Sears v. United States, 343 F.2d 139 (5th Cir. 1965), wherein it was stated that the accused could urge the trial judge to grant a motion for acquittal, and were that refused he was still entitled to have the jury instructed on entrapment, despite his judicial denial of the crime alleged since the prosecution's own case-in-chief had injected substantial evidence of entrapment into the case.

[130] 8 U.S.C.M.A. 286, 24 C.M.R. 96 (1957).

entrapment is found to be present as a matter of law on review before that Court, a guilty finding will be reversed even though the issue had been litigated in the trial court and resolved against the accused as a matter of fact. Although that Court has not specifically stated that upon a conclusive showing of entrapment the matter is properly for the determination of the law officer as the military judge,[131] the Court has indicated that the law officer may properly consider and rule upon a motion for a finding of not guilty grounded on entrapment[132] which would be subject to the objection of any court member.[133]

Means are available in federal practice for a possible pretrial abatement of the proceedings[134] as

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[131] But see ACM 56-00745, Edwards, 25 C.M.R. 695 (1956), wherein it was indicated that upon a showing of entrapment as a matter of law the law officer should dismiss the offense.

[132] See United States v. Soule, 9 U.S.C.M.A. 228, 26 C.M.R. 8 (1958).

[133] U.C.M.J. art. 51b.

[134] See Fed R. Crim. P. 12. In United States v. Hill, 328 F.2d 988 (5th Cir. 1964), a hearing on a motion to suppress evidence of entrapment was denied by the trial judge who carried the motion with the case. Compare United States ex rel Hassel v. Mathues, 22 F.2d 979 (E.D. Pa. 1927), wherein habeas corpus was successfully employed to gain the release of an entrapee.

they are in military practice pursuant to the Manual.[135] Despite differences in federal and military pretrial and trial procedures the practice is ostensibly constant when an entrapment issue is presented in the trial court as a question of fact. The issue is to be resolved by the fact finders.

B. RAISING THE ISSUE AND ITS CONSEQUENCES

Entrapment is a unique defense with many peculiarities. Although analagous to a confession and avoidance, a plea of not guilty does not deprive the accused of the defense,[136] but his judicial disclaimer of "I didn't commit the crime alleged" will usually deny him the benefit of the defense both in the trial court[137] and on review.[138] Unless the prosecution's evidence reflects

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[135] MCM, 1951, para. 67a, which permits reference of any defense or objection that can be determined without trial of the issue to the convening authority for determination. See United States v. Nix, 15 U.S.C.M.A. 578, 580, 36 C.M.R. 76, 78 (1965).

[136] Sorrells v. United States, 287 U.S. 435 (1932).

[137] Rodriguez v. United States, 227 F.2d 912 (5th Cir. 1955).

[138] See, *e.g.*, Ortega v. United States, 348 F.2d 874 (9th Cir. 1965); Nutter v. United States, 289 F. 484 (4th Cir. 1932); United States v. Houle, 9 U.S.C.M.A. 228, 26 C.M.R. (1958). *Contra*, Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962). *Compare* Henderson v. United States, 237 F.2d 169 (5th Cir. 1956), wherein the defense of entrapment was held to be available to an accused charged with conspiracy who admitted the alleged overt acts but denied being a party to the conspiracy.

an entrapment[139] the burden of raising the issue is on the accused, and although the Court of Military Appeals has never referred to this as the accused's burden of proof,[140] it has been considered such a burden in federal practice[141] and the Supreme Court has refused to reverse guilty findings based upon instructions delivered to the jury that in essence cast upon the accused the burden of proving his innocence since the burden of

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[139] See Sherman v. United States, 356 U.S. 369, 373 (1958); Marshall v. United States, 258 F.2d 94 (10th Cir. 1958).

[140] But see United States v. McGlenn, 8 U.S.C.M.A. 286, 288, 24 C.M.R. 96, 98 (1957). In McGlenn the following issue was presented: "Whether the law officer was required to instruct that where entrapment is raised the burden was on the defense to show inducement by the Government, but that once this was shown the burden was then on the prosecution to show reasons for such inducement." Ibid. The Court found it unnecessary to decide or discuss that issue. Ibid. However, later in the opinion, at 291, 24 C.M.R. 101, the Court stated: "[W]hen a showing of inducement by a Government agent is made, the prosecution must prove that its agents acted under a reasonable belief that the law was being violated by the accused." (Emphasis added.)

[141] United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952).

proving the defense of entrapment was his.[142] Evidence of entrapment must reflect that activity of an individual who occupied the status of a government agent at the time of the purported entrapment[143] at least tended to cause the accused to commit the crime alleged, and he cannot be denied information which will assist him in presenting the defense.[144]

In raising the issue the accused contends not only that he should be excused for the crime he committed but points a finger at his adversary and in substance indicts the Government for unlawful conduct in inducing

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[142] See Lopez v. United States, 373 U.S. 427, 435-437 (1963). *Compare* United States v. [illegible], 5 U.S.C.M.A. 430, 436, 16 C.M.R. 4, 10 (1954), where the Court stated: "[T]he Government *always* bears the burden of establishing the accused's guilt beyond a reasonable doubt." *Ibid.* (Emphasis added.)

[143] *But see* Henderson v. United States, 237 F.2d 169 (5th Cir. 1956), wherein it was held that the defense of entrapment is available to an accused in a federal prosecution albeit the inducing agents were state and not federal agents. *Also see* United States v. Horne, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958) and United States v. Wolf, 9 U.S.C.M.A. 137, 25 C.M.R. 399 (1958), which indicate that where a governmental agency status is questionable it should be treated as a factual issue for the court members determination.

[144] In United States v. Hawkins, 6 U.S.C.M.A. 135, 19 C.M.R. 261 (1955), the Court held that the accused's right to the identity of a government informant which was necessary for the defense of entrapment was paramount to the government's claim of privilege. *Compare* United States v. Ness, 13 U.S.C.M.A. 18, 32 C.M.R. 18 (1962).

the crime. The Government then becomes a party-defendant in the litigation and must go forward to meet the burden of proof[145] to dispel the claim of entrapment. In [illegible], a narcotics case, the Court of Military Appeals appeared to make a "rule of justification" mandatory in military law, stating that where an inducement had been shown that the prosecution was obligated to prove that the government agents had reasonable grounds to believe or suspect that the accused was engaged in the commission of a crime or was about to so engage, or that the original suggestion or initiative for crime originated with the accused.[146] The Court indicated that sufficient grounds might be shown by statements made by the accused relative to previous similar acts upon his part that had come to the attention of government agents. In the same paragraph the Court then stated:

> *Likewise* evidence of the accused's prior convictions for narcotics offenses is

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[145] United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952); United States v. [illegible], 8 U.S.C.M.A. [illegible], [illegible], 25 C.M.R. [illegible], 101 (1958).

[146] *Compare* United States v. Watkins, 11 U.S.C.M.A. 611, 29 C.M.R. 427 (1960).

[illegible]

> [illegible]

[illegible]

[illegible]

> also relevant as tending to refute the contention that the intent to bring about the crime originated with the... [government agent]....Furthermore, in order to meet the issue of entrapment, the prosecution may cross-examine or interrogate witnesses as to whether at approximately the time of the alleged offense, for which an accused is being tried, he engaged in similar acts, such testimony relevant in order to show that the accused was not a victim of [illegible]... [government agent].107 [Emphasis added.]

This represents a commingling of two different and distinct issues. The information possessed by government agents, whether true or false, may give them reasonable grounds to induce the accused, but the "predisposition" or "general intent" of the accused is a separate and distinct matter, and evidence received bearing on that issue should not be considered together with what the agents may have suspected or believed was the accused's inclination. This commingling is not uncommon in the Federal courts[108] and has also permeated the [illegible]

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107. 8 U.S.C.M.A. 286, 24 C.M.R. 96 (1957).

108. See, e.g., United States v. Whiting, 296 F.2d 512 (1st Cir. 1961); Washington v. United States, 275 F.2d 687 (5th Cir. 1960).

instructional guide for law officers.[156] However, the Court of Military Appeals has yet to reverse an entrapment case because of instructional error involving the commingling of "justification" and "predisposition".

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[156] U.S. Dep't of Army, Pamphlet No. 27-9, Military Judges' Guide [illegible] (1969). The sample instruction on entrapment, located in appendix XIV on p. 157, cites [illegible], and with respect to what court members may be advised that they may consider concerning the requirement of reasonable belief or suspicion of government agents in advance of encouraging an accused to commit an offense, states as follows: /In determining whether such reasonable belief or suspicion existed, you may consider, together with all the other evidence in the case, testimony tending to establish that (the accused engaged in similar offenses at approximately the same time) (that he had been previously convicted of the same offenses) (and) (that he had made statements relative to prior similar acts which statements were known to the agents at the time of the alleged entrapment)/. The sample instruction is in error in a number of particulars. First, not all the other evidence should be so considered, only information possessed by the agents in advance of encouragement. Second, the first two of the three specific matters in parentheses contain the same defect. Third, the third specific matter in parentheses carries too great a burden for government agents since it requires that they have knowledge of the accused's statements; they are only required to have reasonable belief or suspicion, not knowledge. It would also be well to mention that the sample instruction does not reflect the "will to resist" test contained in the principal opinion of United States v. Watkins, 11 U.S.C.M.A. 611, 29 C.M.R. 427 (1960).

Not only has the Supreme Court not made the "rule of justification" mandatory in federal practice, the Court has provided the prosecution with a weapon of unlimited calibre, capable of destructive power for assaulting that under the "rule of justification", when in Sorrells it was stated:

> [I]f a defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.150 [Emphasis added.]

This "rule of an appropriate and searching inquiry" has become the Pandora's box of entrapment, and with the exception of their previous convictions for similar offenses[151] the Supreme Court has left unanswered what is "appropriate" and how much latitude the prosecution may be permitted in introducing matter that has been unearthed as a result of a "searching inquiry" bearing upon the accused's "conduct" and "predisposition". The Court was emphatic concerning the possible harm an

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[150] 287 U.S. 435, 451-452 (1932).
[151] Sherman v. United States, 356 U.S. 369, 375 (1958).

accused would suffer as a result of the rule when in Sorrells it was stated: "[I]f in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."[152] But disadvantages do occur. Although an accused is standing trial for one or more specific offense(s), federal trial courts have permitted evidence of various extraneous matters to be introduced against the accused bearing on his "conduct" and "predisposition". Such matters have included, inter alia, previous convictions for similar offenses,[153] previous bad acts,[154] and even information from anonymous telephone calls.[155]

"An accused has no more basic right than that of a fair trial".[156] But it is suggested that there is

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[152] 287 U.S. 435, 451-452 (1932).
[153] See Sherman v. United States, 356 U.S. 369 (1958).
[154] See, e.g., United States v. [illegible], [illegible] F.2d [illegible] (7th Cir. 1958); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); United States v. Abdallah, 149 F.2d 219 (2nd Cir. 1945). In Abdallah, supra, the prosecution, unable to introduce evidence under the "rule of justification", successfully entered into evidence matter concerning one hundred and fifteen previous bad acts.
[155] See United States v. Whiting, 296 F.2d 512 (4th Cir. 1961).
[156] United States v. Lewis, 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966).

a right much more profound than that of a fair trial. The right not to be induced by governmental inducement into committing a crime, which right would obviate the necessity for relying upon the right of a fair trial. However, once a trial commences the right of fairness is appreciably diminished. The accused is again exposed and the extent of the exposed abuse will be directly related to his background of derelictions. The more unsavory his background the greater the probability that he will be found guilty notwithstanding both the nature of governmental entrapping activity and the fact that his instant offense would not have been committed except for governmental inducement. No other defense permits the lid of *Pandora's box* to be opened so wide and the accused's trial may well be considered a trial of the character of the accused rather than a trial of the circumstances directly related to the instant offense, a concept which is generally considered foreign to American jurisprudence. And whether evidence is admitted under the "rule of justification" or the rule of "an

appropriate and searching inquiry" or such matter is resolved under both theories, the result is that the accused may well be punished as a "bad man" deserving of conviction.

V. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

The doctrine of entrapment is an expanding, complex subject matter that has by no means achieved its full size or shape. With crime on the increase it can be anticipated that government agents will resort ever increasingly to entrapping activity. Up until the present time Congress has not seen fit to curtail such activity by legislation and judicial regulation is of a purely ex post facto nature, subsequent to success achieved by government agents in encouraging a suspect to commit a crime. Although governmental activity that results in a criminal act is frequently condoned on the ground that it was only the agent's purpose to "discover" criminal activity or to provide a suspect with the "opportunity" to commit a crime, this does not make such activity any more honorable. The result is still the same, causing or aiding crime, and to call it anything else is analogous to Humpty Dumpty's response to Alice on the meaning of a word - "'When I use a word,' Humpty Dumpty said...'It means just what I choose it to mean - nothing more nor less.'"[157]

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[157] Carroll, Alice's Adventures in Wonderland and Looking Through the Looking Glass, [illegible], undated, printed by Grosset and Dunlop.

The underlying purpose of such activity is to gain evidence of crime by causing the suspect to incriminate himself. Yet such a search for evidence receives less protection than does a search after the commission of a known crime. With no fourth amendment probable cause requirement and without the neutral and detached judgment of a magistrate to sanction or forbid entrapping activity, the government agent, engaged in the often competitive business of ferreting out crime, is an agent virtually free of restraint. No reported federal or military case has been found wherein a government agent has been prosecuted for an entrapment, although this was suggested about a quarter of a century ago as a means of deterring the extremes of such conduct.[158]

Criminals should not be coddled, but no citizen should be made the subject of an entrapment by government agents. In Cox v. Louisiana[159] and Raley v. Ohio[160] the Supreme Court has recently recognized that nonpurposeful entrapments are protected by fourteenth

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[158] See Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. R. 245 (1942).
[159] 379 U.S. 559 (1965).
[160] 360 U.S. 423 (1959).

amendment for passage. However, it is suggested that the right not to be entrapped needs no creation. It is a natural right[161] of every citizen protected by the ninth amendment to the federal constitution as a right retained by the people. A far more important right than any one of those rights that are expressly mentioned in the Bill of Rights, that accrue to an accused after a crime has been committed.

V. RECOMMENDATIONS

The recognition of entrapment as a constitutionally protected right will probably have little effect on the activity of government agents albeit a specific criminal statute forbids government agents from conspiring to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right secured by the Constitution,[162] and another statute penalizes an

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[161] In Dean Roscoe Pound's book, "The Spirit of the Common Law", he defines natural rights, at 92, as follows: "Natural rights mean simply interests which we think ought to be secured; demands which human beings may make which we think ought to be satisfied. It is perfectly true that neither law nor...[government] creates them."

[162] 18 U.S.C. 241, which carries a ten year penalty and a $5,000 fine.

agent from willfully subjecting an individual to the deprivation of such a right.[163]

What is required to protect against entrapment is judicial regulation of entrapping activity in advance of its commencement. The decision as to whether sufficient information is available to warrant any form of governmental activity that may result in a crime should not be made by a government agent. Since the underlying purpose of entrapping activity is a search for evidence of crime the fourth amendment's requirement of probable cause should first be met, and whether it has been met should be the decision of a judicial officer who then may authorize, with particularity, the quality and quantity of activity that will be permitted. The framework for such judicial regulation is in existence. Federal courts and commissioners are available to pass upon the merits of such a search and regulate its conduct, and, similarily, within the military community commanding

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[163] 18 U.S.C. 242, which carries a one year penalty and a $1,000 fine.

officers occupy the position of [illegible] in [illegible] and such a function.

The foregoing recommendations will contribute to a great extent that the Senate properly the most expressive type of governmental activity and should obviate unjust criticisms that would never have occurred had not a [illegible] [illegible] been responsible for inspiring the crisis in the first instance.

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